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No. 85-959

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

TOWNSHIP OF LACEY, an incorporated village located in Ocean County, New Jersey,

Petitioner,

—against—

JERSEY CENTRAL POWER & LIGHT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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January 6, 1986

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Counterstatement of Questions Presented for Review

1. Did the Court below correctly rule that the Township of Lacey's ordinances prohibiting the transportation and storage of spent nuclear fuel regulated the operation of a nuclear plant and were predicated on radiological safety concerns as opposed to concerns regarding municipal land use?

2. Did the Court below correctly rule that, as a matter of law, the Township's ordinances are preempted by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, and hence violate the Supremacy Clause, U.S. Const. art. VI, cl. 2?

3. Did the Court below correctly rule that, as a matter of law, the Township's ordinances are preempted by the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812, and hence violate the Supremacy Clause, U.S. Const. art. VI, cl. 2?

4. Do the ordinances unduly burden and discriminate against interstate commerce and hence violate the Commerce Clause, U.S. Const. art. I, § 8, cl. 3?

5. Did the Court below correctly rule that the facts alleged by the Township to be in issue are neither material nor essential to a determination that the ordinances are unconstitutional?

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In the
SUPREME COURT OF THE UNITED STATES
October Term
No. 85-959

TOWNSHIP OF LACEY, an incorporated village located in Ocean County, New Jersey,

Petitioner,

—against—

JERSEY CENTRAL POWER & LIGHT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counterstatement of the Case

Respondent Jersey Central Power & Light Company ("JCP&L")* is the owner of the Oyster Creek Nuclear Generating Station ("Oyster Creek"), located in the Township of Lacey ("Lacey"), New Jersey. Oyster Creek is a federally licensed utilization facility as defined by the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2014(cc), and as such is authorized to generate nuclear energy and to store spent nuclear fuel ("spent fuel") on-site. The spent fuel in question is uranium enriched in the isotope 235, and constitutes "special nuclear material" as defined in the AEA, 42 U.S.C. § 2014(aa). The spent fuel is highly radioactive and constitutes "hazardous material" as defined in the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 1802(2).

*JCP&L is a subsidiary of General Public Utilities Corporation. JCP&L is affiliated with Metropolitan Edison Company, Pennsylvania Electric Company, GPU Service Corporation, Cherry Hill Fuels Corporation, and GPU Nuclear Corporation.

In 1975, JCP&L transported 224 of the spent fuel assemblies generated at its Oyster Creek nuclear plant to the Western New York Nuclear Service Center in West Valley, New York ("West Valley") for storage and anticipated reprocessing by West Valley's lessee. Thereafter, the federal government prohibited reprocessing of spent fuel assemblies, and West Valley terminated the lease of its lessee. Subsequently, JCP&L was required by the United States District Court for the Western District of New York to commence removal of its spent fuel from West Valley by October 1, 1984 and to complete the return of the spent fuel to Oyster Creek no later than May 31, 1985.*

During the course of the New York proceedings, Lacey, with knowledge of the developments unfolding at West Valley, passed an ordinance which sought to prevent JCP&L from returning the spent fuel to Oyster Creek by banning the transportation of spent fuel into the Township for purposes of storage (the "Ordinance"). While the Ordinance permits spent fuel generated at JCP&L's Oyster Creek plant to be stored within the Township, any such fuel that is once removed from the Township cannot be returned "for the purpose of storing the same on a temporary or permanent basis" (Lacey Pet. viii).**

JCP&L commenced an action in the United States District Court for the District of New Jersey seeking a declaratory judgment, an injunction and other relief. The District Court granted JCP&L's Motion for Summary Judgment, declaring the Ordinance unconstitutional and invalid because it was preempted by the AEA and HMTA and violated the Commerce Clause, U.S. Const. art. I, § 8, cl. 3 (App. 28a-41a).

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*See *New York State Energy Research & Development Auth.* v. *Nuclear Fuel Services, Inc.*, 561 F. Supp. 954 (W.D.N.Y. 1983) for the background of the litigation which led to the court order requiring removal.

**Citations in the form "Lacey Pet. _____" refer to the designated page in the Township's Petition For a Writ of Certiorari, and in the form "App._____" to the Appendix thereto.

Subsequent to the District Court's issuance of an order enjoining enforcement of the Ordinance, Lacey amended the Ordinance to impose criminal penalties on any person or entity returning spent fuel to the Township (the "Penalty Ordinance") (Lacey Pet. ix). Thereafter, on JCP&L's motion, the District Court declared the Penalty Ordinance unconstitutional on the same grounds as the Ordinance.

The Township appealed separately from the orders enjoining enforcement of the Ordinance and the Penalty Ordinance, and the appeals were consolidated. The Third Circuit affirmed the District Court's grant of summary judgment as to both ordinances on the grounds that the Township's ordinances were preempted by the AEA and HMTA (App. 2a-27a).*

A. Lacey Presented No Genuine Issues Of Material Fact To The Courts Below.

Lacey did not submit any affidavits, exhibits or other evidence in opposition to JCP&L's Motion for Summary Judgment. Instead, Lacey claimed in legal memoranda and arguments that there were disputed facts, including the Township's unsupported "belief" that Oyster Creek might not be the only viable storage facility for the spent fuel. The District Court "disagree[d] with Lacey that there are genuine issues of material fact in this matter. Indeed, the underlying facts are in many respects matters of public record and in any event not disputed to any material degree" (App. 28a).

On appeal, Lacey asserted that summary judgment was inappropriate because it disputed JCP&L's factual assertion that Oyster Creek was the only viable facility for storage of the spent fuel, and "believed" that other alternatives existed. The Third

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*The Third Circuit first determined that Lacey's appeals were not mooted by the fact that the return of the spent fuel to Oyster Creek had been completed after the District Court's rulings (App. 13a-17a).

Circuit held that whether there were other viable storage facilities was not germane or material to the constitutionality of the ordinances. The Court further held that Lacey's unsupported belief did not constitute facts demonstrating, under Fed. R. Civ. P. 56(c), that there was a genuine issue for trial (App. 17a-18a). The only "fact" issue raised by Lacey in its petition herein (Lacey Pet. 1) is its still unsupported "belief" that alternative viable storage facilities "do indeed exist."*

B. The Courts Below Determined, As A Matter Of Law, That Neither The Purpose Nor Effect Of The Ordinances Related To Land Use.

The courts below also rejected Lacey's attempts to justify the ordinances as an exercise of its control over "land use" as opposed to a concern over radiological safety hazards. Looking to the language of the ordinances themselves, and to what Lacey said about them, the courts below determined that the operation of Oyster Creek would be, and was intended to be, affected by the ordinances. Indeed, nothing in the ordinances mentions or relates to land use. On their face, the ordinances concern only the transportation and storage of spent fuel, not land use.

Thus, the District Court, in rejecting Lacey's assertion that the Ordinance does not affect the operation of Oyster Creek, stated: "This Court can think of no other aspect of nuclear energy which would be more 'nuclear' than radioactive spent fuel rods and the manner in which they must be stored in order to insure the safety of the public to the fullest possible extent" (App. 34a). Similarly, the Third Circuit expressly rejected Lacey's argument that the "avowed purpose" of the Ordinance was an exercise of "traditional authority over land use," concluding that the avowed

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*Lacey also asserts that there are "other factors [which] need to be brought to the Court's attention," including certain alleged assurances of JCP&L and government officials concerning nuclear waste storage (Lacey Pet. 1). No affidavits or other evidence concerning such "assurances" was presented below, and these "factors" are not part of the record.

purpose was "to protect 'the public good' based on 'a local legislative determination that an acceleration of nuclear waste storage within the Township is contrary to the general welfare of its inhabitants' " (App. 23a).

C. The Courts Below Determined A Unique, Local Issue Without Wider Ramifications.

There is nothing in the record to support Lacey's contention that the Third Circuit's decision will have wide-ranging ramifications upon the nuclear power industry and localities. The courts below determined that Lacey's "avowed purpose," and the ordinances' effect, was not land use. Thus, this case does not test the limits of local land use control over operating nuclear facilities. Rather, the Circuit's decision only invalidates ordinances which were specifically aimed to prevent the return of JPC&L's spent fuel to Oyster Creek because of Lacey's concerns over safety. Since JCP&L already has returned the spent fuel to Oyster Creek and does not have any other spent fuel stored away from Oyster Creek, the situation at hand may never reoccur at Oyster Creek or at any other nuclear facility.

This simply is not a case in which there are "special and important reasons for granting certiorari." Sup. Ct. R. 17.1. Lacey presents no issues of national importance. The Court of Appeals correctly applied *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), dealing with the scope of federal preemption under the AEA. The Court of Appeals also correctly ruled that the ordinances violated the HMTA. The holdings of the Court of Appeals present no conflict with any decision of this Court, any other Court of Appeals or any state court of last resort. In short, Lacey advances no valid reason why certiorari should be granted.

ARGUMENT

POINT I

The Third Circuit's Decision Follows An Unbroken Line Of Authority And Presents No Important Issue Of Federal Law That Has Not Already Been Addressed By This Court.

A. The Third Circuit Correctly Applied Principles Settled By This Court.

Lacey erroneously asserts that the Third Circuit decided important questions of federal law concerning the level of permissible involvement of state and local governments in the storage of spent fuel which have not been settled by this Court. To the contrary, this Court in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), established specific guidelines as to such involvement which were scrupulously followed by the Third Circuit as well as the District Court.

In *Pacific Gas*, several electric utilities sought a declaration that provisions of the California Public Resources Code were unconstitutional because they had been preempted by the AEA. This Court observed that the AEA vests in the Nuclear Regulatory Commission ("NRC") (formerly the Atomic Energy Commission) the exclusive jurisdiction to license and regulate the operation of any nuclear plant. In enacting the AEA, Congress created a pervasive federal regulatory scheme governing the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials and "[u]pon these subjects, no role was left for the states." *Id.* at 207.*

*The NRC may, however, enter into an agreement with the governor of a state pursuant to Section 274 of the AEA, 42 U.S.C. § 2021(b), whereby certain functions may be delegated to the state. Here, neither Lacey nor the State of New Jersey has entered into a § 274 agreement with the NRC, and Lacey does not claim to be exercising authority under any such agreement.

This Court recognized that Congress preserved some room for state regulation of nuclear-powered electricity generation. While the federal government maintained complete control of the safety and nuclear aspects of energy generation, the states were left with their traditional role of regulating economic aspects such as "the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Id.* at 212.

This Court emphasized, however, that state regulation is invalid if it arises from fears regarding the safety of nuclear power. The Court stated:

> At the outset, we emphasize that the [California] statute does not seek to regulate the construction or operation of a nuclear power plant. It would clearly be impermissible for California to attempt to do so, for *such regulation, even if enacted out of nonsafety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation.* Respondents appear to concede as much. Respondents do broadly argue, however, that although safety regulation of nuclear plants by States is forbidden, a State may completely prohibit new construction until its safety concerns are satisfied by the Federal Government. We reject this line of reasoning. *State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.* When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, *the test of pre-emption is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act.*

Id. at 212-13 (emphasis added; citation and footnote omitted).

Although the Court held that the statute in *Pacific Gas* did not conflict with the AEA, its analysis fully supports, and

indeed mandates, the Third Circuit's decision that the Lacey ordinances are preempted. Unlike here, the California statute in *Pacific Gas* (a) applied solely to activities that preceded construction of a nuclear facility and (b) had an avowed economic, rather than a safety, purpose as the rationale for its enactment. *Id.* at 216. *Pacific Gas* leaves no room for doubt that because the Lacey ordinances affect the operational and safety aspects of an existing nuclear facility, they are preempted regardless of the Township's motivations. Thus, the Third Circuit's decision correctly applied *Pacific Gas*.

B. The Third Circuit's Decision Is Consistent With The Relevant Federal And State Decisions.

The Federal Circuit Courts of Appeals have consistently found federal preemption pursuant to the AEA where a state or local regulation interfered with the operation of a nuclear power plant. In fact, the AEA has specifically been interpreted to preempt state rules designed to prohibit both the transportation into and the storage within a state or locality of spent fuel generated outside such state or town. *See Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied sub nom. Don't Waste Washington Legal Defense Foundation* v. *Washington*, 461 U.S. 913 (1983); *Illinois* v. *General Electric Co.*, 683 F.2d 206, 215 (7th Cir. 1982), *cert. denied sub nom. Hartigan* v. *General Electric Co.*, 461 U.S. 913 (1983).

In *Washington State*, a Washington law prohibiting the transportation into and storage within the State of low-level radioactive waste produced outside the State was held by the Ninth Circuit to be in violation of the Supremacy Clause "because it [sought] to regulate legitimate federal activity and to avoid the preemption of the Atomic Energy Act." 684 F.2d at 630.

Likewise, in *General Electric*, the Seventh Circuit found that an Illinois law prohibiting the transport into the State of spent fuel generated outside Illinois for storage or disposal purposes

was preempted by the AEA. The Court stated that an analysis of the pervasive regulatory structure of the AEA and its legislative history "compels the conclusion that the Act equally preempts state regulation of the storage, and shipment for storage, interstate and intrastate alike, of spent nuclear fuel." 683 F.2d at 215.

Washington State and *General Electric* establish that any state or local statute regulating the storage, transportation, or disposal of nuclear waste, including spent fuel, invades a field exclusively occupied by the AEA and is therefore preempted. *See also Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd without opinion*, 405 U.S. 1035 (1972).

In its decision below, the Third Circuit agreed with the District Court's determination that the instant case was not materially distinguishable from *Washington State* or *General Electric* (App. 24a). The Third Circuit stated:

> Inasmuch as Congress has specifically established this pervasive scheme of federal regulation established by the AEA and NRC regulations, and inasmuch as the legislative history of the AEA and the regulations implementing it establish beyond dispute that it is congressional intent that federal law should regulate the radiological safety aspects of the nuclear power industry, including the storage and shipment of spent fuel, we find that the ordinances under our preview are unconstitutional (App. 24a).

Nevertheless, Lacey relies upon three state court decisions for the proposition that comprehensive federal preemption by the AEA does not exist. None of those cases establish any such proposition. Moreover, unlike the present situation, each of the cited decisions dealt only with state regulation *prior to construction* of a nuclear facility.

In *State ex rel. Utility Consumers Council of Missouri, Inc.* v. *Public Service Comm'n*, 562 S.W.2d 688 (Mo. Ct. App.), *cert. denied*, 439 U.S. 866 (1978), the Court stated:

> The federal government regulates *how* nuclear power plants will be constructed and maintained; the State of Missouri regulates *whether* they will be constructed.

Id. at 698 (Emphasis in original). In *Northern California Ass'n to Preserve Bodega Head & Harbor, Inc.* v. *Public Utilities Comm'n*, 61 Cal. 2d 126, 390 P.2d 200, 37 Cal. Rptr. 432 (1964), the Court held that the AEA had not preempted the issue of concern over the location of atomic reactors prior to construction. 390 P.2d at 204. In *Marshall* v. *Consumers Power Co.*, 65 Mich. App. 237, 237 N.W.2d 266 (Mich. Ct. App. 1975), the Court held that, while the AEA barred it from considering the plaintiff's allegations concerning the workability of the *proposed* nuclear plant, it was not preempted from considering allegations concerning possible non-radiological hazards such as the creation and effect of steam, fog and ice which might result from the operation. 237 N.W.2d at 276-77.

As is apparent, none of these three state court decisions (only one of which emanates from the highest court of a state) has any applicability to the matters presented by Lacey. Each simply held that the AEA does not preempt pre-construction concerns over non-radiological matters, and to that extent, these cases are consistent with *Pacific Gas*. Here, on the other hand, the Lacey ordinances were enacted *after* construction and clearly affect, and interfere with, the operation of a nuclear facility long after it became functional.

C. The Third Circuit Correctly Held That The Lacey Ordinance Is Preempted By The AEA.

Lacey acknowledges, as it must, that the operation of Oyster Creek is an area "within the federal government's exclusive control" (Lacey Pet. 12). Although Lacey argues that its Ordinance prohibiting transportation and storage of spent fuel (except that generated by Oyster Creek which has never been removed from the Township) is merely a land use determination, it concedes that

the Ordinance was enacted based on a "determination that an acceleration of nuclear waste storage within the Township is contrary to the general welfare of [Lacey's] inhabitants" and contrary to their "best interest" (Lacey Pet. 12).

Thus, Lacey's contention that control over "land use" was the motivation for its Ordinance is nothing more than a made-for-litigation argument which must be rejected. Lacey submitted no affidavits or other evidence as to the motivations behind the enactment of the Ordinance. Nothing in the Ordinance mentions or relates to land use, and the plain wording of the Ordinance contradicts Lacey's efforts to justify its enactment on "land use" grounds.

The Ordinance relates only to the transportation and storage of spent fuel. Section 2 of the Ordinance permits the storage within the Township of spent fuel generated at JCP&L's Oyster Creek facility so long as it is never removed from the Township, but explicitly prohibits the return of JCP&L's spent fuel for storage if it has been taken from the Township (Lacey Pet. viii). Since the Ordinance does not ban storage of spent fuel on land within the Township, Lacey's purpose in enacting the Ordinance obviously was not to regulate the use of land, but rather the transportation and storage in the Township of the West Valley fuel.

As the Third Circuit determined, Lacey's Ordinance affects the operation of an existing nuclear facility by regulating the transportation and storage of "spent fuel" and "radioactive waste." These subjects constitute radiological matters which fall squarely within the exclusive Federal jurisdiction of AEA, 42 U.S.C. § 2021(c)(4), and the regulations promulgated thereunder, 10 C.F.R. §§ 30-31, 51, and 70-73. Since the transportation and storage of spent fuel are areas that have been occupied by Federal law, the Ordinance must fall. *Pacific Gas*, 461 U.S. at 207; *Washington State*, 684 F.2d at 630-32; *General Electric*, 683 F.2d at 214-16.

D. The Third Circuit Correctly Held That The Lacey Ordinance Is Preempted By The HMTA.

Lacey also claims that the Third Circuit erred in holding that the HMTA preempts the Ordinance (Lacey Pet. 14-15), but does not claim that this ruling conflicts with any decisions of this or other courts. Instead, Lacey argues that its Ordinance makes no attempt to route the transportation of spent fuel or to regulate the safety of its transportation and, therefore, the HMTA should not apply. Lacey has misconstrued both the HMTA regulations and the ruling of the Third Circuit.

Pursuant to statutory authority, the United States Department of Transportation ("DOT") has enacted a comprehensive body of regulations governing the transport of hazardous materials in commerce known as the Hazardous Materials Regulations ("HMR"), 49 C.F.R. §§ 171-179 (1982), including a final rule entitled "Radioactive Materials; Routing and Driver Training Requirements," commonly known by its docket number, HM-164, 46 Fed. Reg. 5298 (1981), which governs the highway transportation of radioactive materials. The validity of HM-164 was recently upheld in *City of New York* v. *United States Dep't of Transportation*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984). HM-164, among other things, mandates specific routing requirements for "highway route controlled quantities" of radioactive materials, including spent fuel. 49 C.F.R. § 177.825(b).

Section 112 of the HMTA mandates that all inconsistent state regulations are preempted. A state or local law is "inconsistent" with Federal requirements under the HMTA when it is not possible to comply with both, or where state requirements are an obstacle to the execution of the Federal law. 49 C.F.R. §§ 107.209 (c)(1), (2).

The Lacey Ordinance is a "routing rule" as that term is defined in Appendix A to HM-164 because it effectively restricts or delays movement by public highway of motor vehicles contain-

ing hazardous materials and applies because of the nature of the cargo. The Ordinance prohibits transportation into Lacey of spent fuel for stc age on routes and at locations which have been authorized by HM-164. Thus, as the Third Circuit held, the Ordinance is inconsistent with the HMTA (App. 27a).

Lacey contends that the HMTA does not preempt the Ordinance because the Ordinance does not attempt to set a route or to regulate the safety of the transportation of the spent fuel. That argument misses the point. The Ordinance totally bans the transportation into Lacey of any spent fuel for storage. It is specious to claim that such a regulation does not conflict with DOT regulations which permit transportation of spent fuel into Lacey in order to store the fuel at Oyster Creek. The effect of Lacey's Ordinance on the transportation of spent fuel is to prohibit the shipment of hazardous materials which is otherwise permissible. This effect is virtually identical to that of the rules struck down in *City of New York*, 715 F.2d at 752. Accordingly, the Ordinance is preempted by the HMTA.

E. There Are No Issues Presented of Extreme National Importance Or With Wide-Ranging Ramifications.

As shown, the Third Circuit's ruling was based on a determination that the Lacey ordinances improperly regulated the operations of Oyster Creek, and were not merely an exercise of traditional authority over land use. Since the ruling does not purport to restrict appropriate exercise of "land use" activities, there are no issues of national importance or with wide-ranging ramifications upon the nuclear power industry and localities as claimed by Lacey (Lacey Pet. 3).

Additionally, because the Lacey ordinances were specifically tailored to deal with the fact that spent fuel which had been generated at Oyster Creek and then stored elsewhere was being returned to Oyster Creek, this case involves a unique set of cir-

cumstances which is unlikely to reoccur. As such, the case is outside the scope of those considerations of importance which alone justify granting a writ of certiorari. Sup. Ct. R. 17.1(c).

In sum, the Third Circuit's holding that the Lacey ordinances violated the AEA correctly applied the principles previously approved by this Court in *Pacific Gas*, is not in conflict with applicable decisions, and involves no new issues of national importance. The Circuit also correctly ruled that the ordinances violated the HMTA. Because there is no conflict in the application of relevant principles of law, there is no basis for granting certiorari. *See, e.g., Wisconsin Electric Co.* v. *Dumore Co.*, 282 U.S. 813 (1931) (per curiam); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

POINT II

The Lacey Ordinance Is Unconstitutional Because It Unduly Burdens Interstate Commerce.

Although the District Court found that the Ordinance unduly burdens interstate commerce, the Third Circuit did not reach that constitutional issue in light of its affirmance of the District Court's disposition on the basis of the Supremacy Clause (App. 17a n. 9). Lacey lists as one of the questions presented for review the issue of whether the Ordinance violated the Commerce Clause (Lacey Pet ii), but it does not discuss this issue elsewhere in the petition.* However, should this Court reach the issue, it is submitted that the Ordinance is unconstitutional because it violates the Commerce Clause.

The Ordinance erects a discriminatory barrier against importation of spent fuel which, although generated at Oyster Creek,

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*Lacey additionally asks this Court to determine whether, in the event of a reversal, Lacey may impose a penalty on JCP&L (Lacey Pet ii), but it again fails to discuss that issue in its petition. Since such issue would only arise upon reversal, it is not addressed herein.

was then located out of state. At the same time, the Ordinance does not prohibit storage of spent fuel generated at Oyster Creek which has never left the Township. There is no difference in physical characteristics between the spent fuel generated at Oyster Creek but then located outside Lacey and the spent fuel stored (or to be later generated and stored) within Lacey. Lacey simply drew an arbitrary distinction—its sole criterion for distinguishing between banned spent fuel and permissible spent fuel was the location of the spent fuel at a certain point in time.

In *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), this Court invalidated a New Jersey law that prohibited the importation of solid or liquid wastes originating outside the State but did not ban the storage of waste generated within the State. The Court held that the statute discriminated *on its face* against interstate commerce, stating:

> *If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter.* The New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution.

Id. at 629 (emphasis added).

The Court also noted:

> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation . . . *What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.*

Id. at 628-29 (emphasis added). *See also Illinois* v. *General Elec-*

tric Co., 683 F.2d 206 (7th Cir. 1982), *cert. denied sub nom. Hartigan* v. *General Electric Co.*, 461 U.S. 913 (1983).

Here, the Ordinance does not merely erect a discriminatory barrier against importation of spent fuel originating out of state, which would of itself require invalidation of the Ordinance. More egregious, the Ordinance attempts to require other states to deal with spent fuel which originated in Lacey but was temporarily stored outside the Township. The Ordinance is thus a *per se* violation of the Commerce Clause.

In addition, as found by the District Court, even if the Ordinance is not invalid *per se*, the Ordinance still violates the Commerce Clause because it does not regulate evenhandedly and its effect on interstate commerce "obviously is more than incidental" (App. 40a-41a). *See Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

Conclusion

For the reasons stated herein, Lacey's Petition for a Writ of Certiorari should be denied in all respects.

Respectfully submitted,

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